

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
WRIT PETITION NO.673 OF 2020**

Manjeet Singh

....Petitioner

V/s.

The Union of India through the
Secretary Ministry of Finance & Ors.

...Respondents

Mr. Devesh Tripathi a/w Mr. Jaiprakash Shahdadpuri, Ms Pankti Shah for
Petitioner.

Mr. Pradeep Jetly, Sr. Advocate a/w Mr. J. B. Mishra for Respondents.

Mr. Aakash Singhai, Additional Commissioner, Customs, Indore, present.

CORAM: K.R. SHRIRAM &

A.S. DOCTOR, JJ

DATED : 18th OCTOBER 2022

P.C. :

1 Petitioner is impugning an order dated 30th July 2019 passed by
respondent no.3.

2 Respondents on the basis of intelligence inputs, intercepted a
container destined for ICD, Dhannad, Madhya Pradesh in the name of M/s
Topper Milk (India) Pvt Ltd. Indore with the manifest mentioning the goods
as “footwear and fabric”. On examination, it was found to contain
Electroshock battons, Knuckle dusters and suspected counterfeit personal
care products. The goods were, therefore, confiscated. Further
investigations were carried out and, to cut the matter short, petitioner was
found to be involved. Petitioner is contesting the findings that petitioner
was involved or was the master mind.

3 It is respondents’ case that petitioner used 16 Importer Exporter Code

(IEC's) to import goods (189 consignments in the past and 19 live consignments). Investigation, according to respondents, established that out of the 16 IEC's, 12 IEC's were found to be non-existent, whereas, 4 IEC holders have stated that they have never provided any services to petitioner or his associates to import any consignment. There is also a finding in the impugned order that no payment by way of outward remittances were made for the goods covered by these IEC holders of any of the consignments imported.

4 Petition as originally filed was only to waive the mandatory condition of pre-deposit of 7.5% of penalty as required under Section 129E of the Act and direct Customs Excise Service Tax Appellate Tribunal (CESTAT) to hear the appeal of petitioner on merits without pre-deposit. Subsequently, on liberty granted by the court, petitioner amended the petition to seek quashing of the impugned order dated 30th July 2019 passed by respondent no.3.

5 In *Haresh Nagindas Vora Vs. Union of India*¹ this court held that Section 129E of the Act was amended on 1st October 2014 and the mandatory requirement of pre-deposit incorporated in the Section and powers and discretion conferred with appellate authority to waive / dispense with the pre-deposit was taken away. The amendment was to curtail substantial time expended on adjudication of waiver / dispensation applications. The court held that the Parliament had in its wisdom amended

1. 2017 (353) E.L.T. 154 (BOM)

the provisions of Section 129E of providing deposit of 7.5% and 10%, respectively, as subclauses (i), (ii) and (iii), respectively, provide and it certainly cannot be held to be unreasonable, onerous, unfair or discriminatory. In fact, court upheld the constitutional validity of the amended Section 129E. Paragraphs 10 to 14 of the said judgment read as under:

10. As seen from a plain reading of the provision, Section 129E provides for deposit of certain percentage of duty demanded or penalty imposed or both, as a condition precedent for the appellate authority to entertain an appeal. Subclause (i) and (ii) of Section 129E mandates deposit of 7.5% of the duty demanded or penalty imposed or both, in case of an appeal before the Commissioner (Appeals) (Section 128A) and before the Tribunal (Section 129A) respectively. Clause (iii) of Section 129E provides for deposit of 10% of the duty demanded or penalty imposed or both in pursuance of the order appealed against. The first proviso provides that the amount which is required to be deposited under this section shall not exceed Rs.10 crores.

11. The intention of the Parliament in amending Section 129E by the amending Act in question needs to be noted. Prior to the amendment, in view of the powers and discretion conferred with the appellate authority to waive/dispense with the predeposit, substantial time was expended on the adjudication of such applications and in deciding issues, as to whether, the contention of the applicant in the stay application, of an undue hardship is being caused, could be accepted to grant an appropriate waiver. Resultantly, orders on the stay application generated further litigation before the higher forums taking a toll on the valuable time of the tribunal delaying the adjudication of the appeals. This undoubtedly caused a serious prejudice to the parties before the Tribunal. Thus the aim of the amended provision is also to curtail litigation which had assumed high proportions, leaving no time to the appellate authorities to devote the same to important issues. Considering these hard realities and to have a expeditious disposal of the statutory appeals which undoubtedly is a necessary requirement of effective trade, commerce and business, the Parliament in its wisdom amended the provisions of Section 129E of providing deposit of 7.5% and 10% respectively as subclauses (i), (ii) and (iii) respectively provide. If such is the aim and insight behind the provision, it certainly cannot be held to be unreasonable, onerous, unfair or discriminatory for two fold reasons. Firstly, the object of a public policy sought to be achieved by the amendment, namely speedy disposal of the appeals before the appellate authorities is a laudable object and cannot be overlooked, so as to label the provision as unreasonable and onerous and violative of

Article 14 of the Constitution. Secondly that the amount which is required to be deposited is not unreasonable from what the earlier (pre amended) regime provided.

12. The contention of the petitioner that the provision is rendered discriminatory as it creates two different classes when it mandates predeposit of duty demanded or penalty imposed or both, and more particularly when penalty cannot be considered to be a revenue as it is not a tax requiring it to be safeguarded, also cannot be accepted. It may be pointed out that even the preamended provision stipulated for a deposit in case of appeals from orders levying penalty. This submission of the petitioners also cannot be accepted considering the decision of the Supreme Court in “Vijay Prakash D.Mehta and Jawahar D.Mehta Vs. Collector of Customs (Preventive), Bombay” (AIR 1988 SC 2010 = 1989 (39) ELT 178 (SC) , which lays down that right to appeal is a statutory right and not an absolute right, which can be circumscribed by the conditions in the grant. In “Nand Lal Vs. State of Haryana” (AIR 1980 SC 2097) the Supreme Court referring to the earlier decision in Anant Mills Co. Ltd vs State Of Gujarat & Ors. (AIR 1975 SC 1234) held as under

“It is well settled by several decisions of this Court that the right of appeal is a creature of a statute and there is no reason why the legislature while granting the right cannot impose conditions for the exercise of such right so long as the conditions are not so onerous as to amount to unreasonable restrictions rendering the right almost illusory (vide the latest decision in Anant Mills Ltd. v.State of Gujarat, AIR 1975 SC 1234)”

Thus by virtue of Section 129E the right to appeal as conferred under the said provision is a conditional right, the legislature in its wisdom has imposed a condition of deposit of a percentage of duty demanded or penalty levied or both. The fiscal legislation as in question can very well stipulate as a requirement of law of a mandatory predeposit as a condition precedent for an appeal to be entertained by the appellate authority. In view of the above settled position in law, Section 129E of the Act cannot be held to be unconstitutional on the ground as assailed by the petitioner.

13. Learned Counsel for the revenue is quite right in relying on the decision in the case Nimbus Communications Ltd.(supra), though it arises in the context of Section 35F of the Central Excise Act which is a provision pari materia to Section 129E of the Act. We may observe that the decision was rendered in deciding a central excise appeal, in which the question of law interalia as considered by the Court was that the right of appeal being a vested right, whether the provisions of law as applicable at the commencement of the lis would apply or the amended provisions as on the date of filing of appeal would apply. Though the Court was not dealing with the validity of the provision, the Court considering the provisions of law and considering the decision of the Madras High Court in “M/s.Dream Castle Vs. Union of India & Ors.” (2016 (43) STR 25 (Mad)) and the Allahabad High Court in the case “Ganesh Yadav Vs. Union of India” (2015 (320) ELT 711 (All)) held that Section 35F of the Central Excise Act did not

defeat or render the vested right of appeal illusory and that the condition of predeposit is a reasonable condition and such condition did not defeat the vested right of appeal. The Court accordingly confirmed the order of the Tribunal directing the appellants therein to deposit the sum mandated by Section 35F(1) of the Central Excise Act.

14. As regards the contention of the petitioners relying on the decision of the Supreme Court in Mardia Chemicals Ltd. Vs. Union of India (supra) that the condition of deposit of 75% was held to be invalid and therefore, Section 129E of the Act also is required to be held to be invalid, cannot be accepted. The submission in the present context is too far fetched. Under Section 129E of the Act, the requirement of deposit is 7.5% and 10% respectively as provided in sub clauses (i), (ii) and (iii) of the said provision. As noted by us earlier such reasonable percentage of deposit cannot be labeled as unreasonable deposit. It is surely not a deposit of 75% as considered by the Supreme Court in Mardia Chemicals Ltd. Vs. Union of India (supra) so as to render the right of appeal illusory. In our opinion, the petitioners' reliance on the decision in Mardia Chemicals Ltd. is completely misplaced.

6 In ***Nimbus Communications Ltd. Vs. Commissioner of S.T.Mumbai-IV***²

was also a case where the application for stay was dismissed because appellant failed to comply with the mandatory condition of pre-deposit of 7.5% of the tax amount demanded under Section 35F of Central Excise Act 1944. Petitioner therein had challenged the constitutional validity of the amended Section 35F. Under the amended provisions, there was a clear legislative mandate that the appeal shall not be entertained under sub-section (1) of section 35 unless the appellant has deposited 7.5% of the duty demanded or penalty imposed or both in pursuance of a decision or an order passed by an officer of the Central Excise. The court held that Section 35F as amended cannot be held to be unconstitutional because with the amendment the legislature felt the interest of the Revenue which had to be

2. 2016 (44) S.T.R. 578 (BOM)

secured was the paramount consideration in both the unamended and amended provision. Paragraphs 18, 19 and 21 read as under:

18. As against this, we have a view which has been taken by the Division Bench of the Allahabad High Court. In the case of Ganesh Yadav, the service tax demand confirmed by the Additional Commissioner, Central Excise, Customs and Service Tax, Allahabad, was sought to be impugned. The argument was that even if the appellate remedy can be resorted to that is rendered illusory by a mandatory requirement of pre deposit of seven and a half per cent and, therefore, a declaration was claimed that such a mandatory prescription is ultra vires or unconstitutional.

19. The Division Bench, speaking through the then Hon'ble Chief Justice Dr. D.Y. Chandrachud, took up for consideration the challenge. It referred to all the judgments including the one which have been relied upon before us. The Allahabad High Court in paragraphs 9 and 10 considered this larger challenge and after referring to the judgments, some of which have been relied upon by Mr. Dada, held as under :

"17. Thus, the principle of law which emerges is that the right of appeal is a vested right and the right to enter a superior Court or Tribunal accrues to a litigant as on and from the date on which the lis commences although it may actually be exercised when the adverse judgment is pronounced. Such a right is governed by the law which prevails on the date of institution of the suit or proceeding and not by the law that prevails at the date of the decision or on the date of the filing of an appeal. Moreover, the vested right of an appeal can be taken away only by a subsequent enactment, if it so provides expressly or by necessary intendment and not otherwise.

18. Justice G.P. Singh in his treatise on Statutory Interpretation has succinctly elucidated the principles to be applied in determining whether a statute is retrospective or not, in the following words:

"(ii) Statutes dealing with substantive rights.- It is a cardinal principle of construction that every statute is prima facie prospective unless it is expressly or by necessary implication made to have retrospective operation. But the rule in general is applicable where the object of the statute is to affect vested rights or to impose new burdens or to impair existing obligations. Unless there are words in the statute sufficient to show the intention of the Legislature to affect existing rights, it is 'deemed to be prospective only 'nova constitutio futuris formam imponere debet non praeteritis [2 c. Int. 392]'. In the words of LORD BLANESBURG, 'provisions which touch a right in existence at the passing of the statute are not to be applied retrospectively in the absence of express enactment or necessary intendment.' 'Every statute, it has

been said", observed LOPES, L.J., "which takes away or impairs vested rights acquired under existing laws, or creates a new obligation or imposes a new duty, or attaches a new disability in respect of transactions already past, must be presumed to be intended not to have a retrospective effect". As a logical corollary of the general rule, that retrospective operation is not taken to be intended unless that intention is manifested by express words or necessary implication, there is a subordinate rule to the effect that a statute or a section in it is not to be construed so as to have larger retrospective operation than its language renders necessary. In other words close attention must be paid to the language of the statutory provision for determining the scope of the retrospectivity intended by Parliament." (emphasis supplied)

19. Parliament while substituting the provisions of Section 35F of the Central Excise Act, 1944 by Finance Act (No.2) of 2014, has laid down that the Tribunal or the Commissioner (Appeals) "shall not entertain any appeal" unless the appellant has deposited the duty or, as the case may be, a penalty to the stipulated extent. These words in Section 35F of the Act would indicate that on and after the enforcement of the provision of Section 35F of the Act, as amended, an appellant has to deposit the duty and penalty as stipulated and unless the appellant were to do so, the Tribunal shall not entertain any appeal. This provision would, therefore, indicate that it would apply to all appeals which would be filed on and from the date of the enforcement of Section 35F of the Act. The intendment of Section 35F of the Act is further clarified by the second proviso which stipulates that the provisions of the section shall not apply to stay applications and appeals which were pending before any appellate authority prior to the commencement of Finance (No.2) Act, 2014. The second proviso is a clear indicator that Parliament has exempted the requirement of complying with the pre-deposit as mandated by Section 35F (1) of the Act as amended only in the case of those stay applications and appeals which were pending before any appellate authority prior to the commencement of Finance (No.2) Act, 2014. Consequently, both by virtue of the opening words of Section 35F(1) of the Act as well as by the second proviso to the provision, it is clear that appeals which are filed on and after the enforcement of the amended provision on 6 August 2014 shall be governed by the requirement of pre-deposit as stipulated therein. The only category to which the provision will not apply that would be those where the appeals or, as the case may be, stay applications were pending before the appellate authority prior to the commencement of Finance (No.2) Act, 2014."

21. Having perused this judgment of the Division Bench and its

reasoning, we are clear that section 35F cannot be held to be unconstitutional. Section 35F only ensures that the appeal shall not be entertained unless the amount to the extent mentioned therein is secured. The interest of the Revenue which has to be secured was the paramount consideration in both the unamended and amended provision. Now there is a specific stipulation and the extent to which the interest of the Revenue has to be secured is also clarified. Once there is a clear indication from the language of the Statute and which is plain and unambiguous, then, we do not think that the view taken by the Kerala High Court can be accepted. We would prefer to agree with the Hon'ble Division Bench of the Allahabad High Court in Ganesh Yadav (supra). This is not a case where the principle in Garikapatti Veeraya (supra) relied upon by Mr. Dada can be applied and for the reasons which have been assigned by the Allahabad High Court.

7 Therefore, the question of granting prayer clause (a) would not arise, i.e., waiver of pre-deposit.

8 Mr. Tripathi, counsel for petitioner also submitted that penalty has been imposed under Section 112(a) and (b) (i) of the Customs Act, 1962 (the Act). Mr. Tripathi submitted that there is no basis for arriving at the valuation to impose a penalty not exceeding the value of the goods or to arrive at the figures approximately of Rs.185 crores as the value of the goods. Mr. Tripathi also submitted that there is no finding as to whether the goods were prohibited goods.

9 The other point, which Mr. Tripathi raised was that petitioner wanted to cross-examine certain persons on whose statement respondents have relied upon but that was not granted and hence there is a breach of principles of natural justice.

10 Per contra, Mr. Jetly submitted that the 210 pages elaborate impugned order has in detail dealt with the facts of the case, role of petitioner and how the goods are prohibited goods and how the value was arrived at. Mr.

Jetly submitted that the adjudicating authority has considered the issue as to whether the goods imported using dummy IECs and without outward remittances were prohibited goods as per Section 2(33) of the Act and thus, liable for confiscation under Section 111(d) of the Act read with Section 11 of the Foreign Trade (Development & Regulation) Act 1992 (FTDR Act) read with Rules 12 and 14 of the Foreign Trade (Regulation) Rules 1993 (FTDR Rules). Mr. Jetly submitted that the adjudicating authority has observed that since dummy IEC's being used for import of all 208 consignments (189 in the past and 19 live consignments), IEC holders had not remitted any consideration for the goods imported in the past or present, no banking transactions have taken place for import of such huge quantity of goods, no amount has been remitted to suppliers through banking channel and no record is maintained or available in respect of the consignments imported. It was also submitted by Mr. Jetly that the adjudicating authority has further observed Section 7 of the FTDR Act, read with Rule 12 of the FTDR Rules, stipulates that every person shall make import only with IEC number allotted to him. Section 11 of the FTDR Act, provides that no export or import shall be made except in accordance with the provisions of the FDR Act, or FTDR Rules. Rule 11 of the FTDR Rules, provides that on importation, the owner of such goods shall, in the bills of entry or any other document prescribed under the said Act, state the value, quality, description of such goods to the best of his knowledge and belief and shall subscribe a declaration of the truth of such statement at the foot of such bill of entry or

any other document. Rule 14 of the FTDR Rules, provides that no person shall make, sign or use, cause to be made, signed or used any declaration, statement or document for the purpose of importing any goods knowing or having reason to believe that such declaration, statement or document is false in any material particular. Mr. Jetly submitted that the adjudicating authority has reiterated the finding that all imported goods were prohibited goods.

11. Mr. Jetly also relied upon the judgment of the Apex Court in ***Om Prakash Bhatia Vs. Commissioner of Customs, Delhi***³, where the court, after reproducing definition of 'prohibited goods' under Section 2(33) of the Act, in paragraph 10 held as under:

*10. From the aforesaid definition, it can be stated that (a) if there is any prohibition of import or export of goods under the Act or any other law for the time being in force, it would be considered to be prohibited goods; and (b) this would not include any such goods in respect of which the conditions, subject to which the goods are imported or exported, have been complied with. This would mean that if the conditions prescribed for import or export of goods are not complied with, it would be considered to be prohibited goods. This would also be clear from Section 11 which empowers the Central Government to prohibit either 'absolutely' or 'subject to such conditions' to be fulfilled before or after clearance, as may be specified in the notification, the import or export of the goods of any specified description. The notification can be issued for the purposes specified in sub-section (2). Hence, prohibition of importation or exportation could be subject to certain prescribed conditions to be fulfilled before or after clearance of goods. If conditions are not fulfilled, it may amount to prohibited goods. This is also made clear by this Court in *Sheikh Mohd. Omer v. Collector of Customs, Calcutta and Others* [(1970) 2 SCC 728] wherein it was contended that the expression 'prohibition' used in section 111 (d) must be considered as a total prohibition and that the expression does not bring within its fold the restrictions imposed by clause (3) of the Import Control Order, 1955. The Court negated the said contention and held thus: — "... What clause (d) of Section 111 says is that any goods which are imported or attempted to be imported contrary to "any prohibition imposed by any law for the time being in force in this country" is*

3. (2003) 6 SCC 161

liable to be confiscated. "Any prohibition" referred to in that section applies to every type of "prohibition". That prohibition may be complete or partial. Any restriction on import or export is to an extent a prohibition. The expression "any prohibition" in section 111 (d) of the Customs Act, 1962 includes restrictions. Merely because Section 3 of the Imports and Exports (Control) Act, 1947, uses three different expressions "prohibiting", "restricting" or "otherwise controlling", we cannot cut down the amplitude of the word "any prohibition" in Section 111(d) of the Act. "Any prohibition" means every prohibition. In other words all types of prohibitions. Restriction is one type of prohibition. From item (I) of Schedule I, Part IV to Import Control Order, 1955, it is clear that import of living animals of all sorts is prohibited. But certain exceptions are provided for. But nonetheless the prohibition continues."

(Emphasis supplied)

12. Mr. Jetly also relied upon judgment of the Delhi High Court in ***Commissioner of Customs & Central Excise, Delhi Vs. Achiever International⁴***, in which paragraph 21 reads as under:

21. We have quoted above the exact reasoning and the findings recorded by the tribunal in this regard. The tribunal has not disturbed or adversely commented upon the fact-finding recorded in the order in original. DVD-Rs/CD-Rs can be imported under open general licence. However, as noticed above, the term prohibited goods' in Section 2(33) is much wider than the goods stipulated in Section 11(1). The tribunal has recorded and held that Vineet Gupta, partner of Achievers International is a de facto and true owner of the goods but the same were imported in the name of M/s Neeru Trading Company, a proprietorship of Naveen Kumar. The IEC certificate of Neeru Trading Company was used. The tribunal has, however, recorded that they were not able to envisage any favourable purpose as to why Achievers International which also has IEC Certificate, had resorted to import the DVD-Rs/CD- Rs in the name of the dummy entities. The reason was known to Achievers International and no one else. They should have given an explanation and the onus was on them. Reasons for setting up and making imports through a dummy concern can be many, but all of them will be negative or involve illegality in some form or the other. It is apparent from the impugned order and the reasoning given by the tribunal that this aspect has been noticed but its relevancy and importance has been ignored. The reasoning given by the tribunal in fact records and states that this aspect was unclear and had not been satisfactorily explained by Achievers International. This is an important facet to decide whether or not redemption fine should be imposed in lieu of confiscation and what should be the quantum of fine. At the same time, Revenue was not able to fathom and indicate why Achievers International/ Vineet Gupta had made imports in the name of Neeru Trading Company and

4. 2012 SCC Online DEL 6393

not in their own name. No investigation was made whether imports made by Neeru Trading Company would have remained unaccounted and not be recorded in the books so as to be subjected to tax. What was the motive and reason? High Seas agreement in respect of one consignment though forged does indicate that the said transaction at least would have been reflected in the books of Achievers International.

(Emphasis Supplied)

13. Mr. Jetly submitted that therefore, the goods were prohibited goods and that the adjudicating authority could have imposed penalty upto to Rs.185 crores, but has imposed penalty only of Rs.100 crores on petitioner with regard to Section 112 of the Act and Rs.25 crores under Section 114AA of the Act.

14 On the submissions of personal hearing not being granted, Mr. Jetly submitted that petitioner did not even file a reply to the show cause notice and, therefore, petitioner could not have asked for cross-examination of any person. Mr. Tripathi submitted that petitioner addressed 5 communications seeking cross-examination. In our view, even if petitioner would have addressed any number of communications, it would have made no difference. Petitioner should have first replied to the show cause notice, which has admittedly not been done. In the facts of the present case, and given petitioner's conduct in refusing to even file a reply despite the grant of ample opportunity, we feel that the contention of breach of natural justice as urged by Mr. Tripathi is entirely devoid of merit and without substance. We find that the same has been urged only in an attempt to invoke the jurisdiction of this court under Article 226 of the Constitution of India. In the facts of the present case, there is no cause shown for this court to

interfere in its jurisdiction under article 226 of the Constitution of India. Mr. Jetly also submitted that petitioner has an effective alternative remedy of Appeal under Section 129 E of the Act. We agree with Mr. Jetly.

15 Having heard the counsel, in our view, petitioner should approach the CESTAT by filing an Appeal under Section 129 E of the Act since there are various disputed questions of facts involved that requires to be considered. Further, as pointed out by Mr. Jetly, petitioner's statements have been recorded under Section 108 of the Act, where petitioner has admitted his role and none of those statements are retracted.

16 Considering these facts and circumstances of the case, in our view, petition requires to be dismissed. Petition dismissed.

17 All rights and contentions of the parties are kept open to be raised in the Appeal to be filed in CESTAT.

(A. S. DOCTOR, J.)

(K.R. SHRIRAM, J.)